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October 4, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: April 21, 2004

Case Number: TSO-0101

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (hereinafter referred to as "the individual") for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." ¹

I. Background

The individual is employed by a Department of Energy (DOE) contractor in a position for which a security clearance is required. In October 2002, he was charged with three counts of aggravated assault and one count of aggravated battery in connection with an incident that occurred in June 2002. Acting on this information, the local security office summoned the individual for an interview by a security specialist. After this Personnel Security Interview (PSI), the Manager of the local security office reviewed the individual's file and determined that derogatory information existed that cast into doubt the individual's continued eligibility for a security clearance. The Manager informed the individual of this determination in a letter that set forth in detail the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his continued eligibility for access authorization. The individual requested a hearing on this matter. The Manager forwarded this request to the Office of Hearings and Appeals and I was appointed the Hearing Officer.

¹ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will be referred to in this Decision as access authorization or a security clearance.

II. Statement of Derogatory Information

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraph (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710 et seq. Paragraph (l) defines as derogatory information indicating that the individual "has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable or trustworthy; or which furnishes reason to believe that he may be subject to pressure, coercion, exploitation or duress which may cause him to act contrary to the best interests of the national security." 10 C.F.R. § 710.8(l). Under this paragraph, the Letter refers to the June 2002 incident that led to the individual being charged with three counts of aggravated battery and one count of aggravated assault.

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a "common-sense judgment . . . after consideration of all relevant information." 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether restoring the individual's security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual's conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). *See Personnel Security Hearing*, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995)(*affirmed* by OSA, 1996), and cases cited therein. For the reasons that follow, I conclude that the individual has not made this showing, and that his clearance should therefore not be restored.

IV. THE HEARING

The hearing in this matter occurred on July 15, 2004. A security analyst, the individual and three of the individual's friends testified at the hearing. The individual testified that he owned land in a rural

area, and that he had a legal right to irrigate a portion of that land "once, two, three times," depending on how much water was available in a given year. Hearing Transcript (Tr.) at 12. He added that there were three water commissioners who were in charge of the irrigation ditches in his area. On June 11, 2002,

these three commissioners came into my property with three other people. And they just drove right into my property, they did not call me that they wanted to have a meeting, they did not send me a letter saying they wanted to meet with me, they just drove in. And I was outside. I was feeding a steer at the time. I had a couple of puppies there. And one of the individuals gets down, and I say hello, and he says hello, and he tells me, "Don't go get those dogs on me. Don't go sic those dogs on me." And I said, "well, don't worry about the dogs, they're just puppies. Don't worry about the dogs." And, I said, "I know why you guys are here. You're here in regards to the water, and I'll tell you one damn thing, I'm sick and tired of somebody breaking my diversion dam so I can't irrigate, and I've had it, you know. Somebody has been breaking my diversion dam, and I'm telling you so you'll be aware of it." And one of these guys, . . . , he kind of jumps back . . . , and he says, "Well, are you accusing me of breaking your diversion dam?" And I said, "No, I'm not accusing of that But I'm telling you that I want it stopped. If you guys are doing it, I don't want it -- I want you to stop it. And another thing, I don't want to discuss this matter about the water issue here at this time with this crowd. Why don't you guys leave my property, get the heck off my property. I don't want to discuss this thing." At this time they refused to leave. They said they were not going to leave, and the profanity started. . . . And I said "you are leaving today." And they said, "No, we're not leaving." And the profanity continued. They said, "we're not leaving until we're good and 'F' ready to leave." And I said, "No, you're leaving." And they said, "No, we're not leaving." And then I said, "You're leaving." So I turned around, and at this time they said, "you're lucky we don't beat the shit out of you." And I went inside. At that time I was -- I felt that I was threatened, since there were six of them, I was by myself, I had nobody there. Yes I did go inside and I grabbed my revolver. And I went outside and shot into the ground twice. And at this time they still refused to leave. . . . And then I said, "You guys better leave before something happens." And they all -- some of them jumped in the truck. And this one individual came at me, he's about 6'2", 350 pounds, and he threatened me that he was going to beat the shit out of me. And I said, "You better be careful what you're saying, because I don't want nothing to happen to you, and you better get the heck off my property." At that time he still came at me, and I kept my distance away from him. I still had my revolver in my right hand. He got into his truck and he said, "Why don't you go over to the end of the gate so I can beat the heck out of you?" And he didn't say "the heck," he said some other words. He says, "I really want to kick your ass." And at that time I reached in there to tell him . . . "you better get the heck off my property," and then that's when he said that I committed battery on him. I never touched him.

Tr. at 12-15. He added that he had not had any previous "run-ins" with the six individuals. When asked why things got heated so quickly, he replied that two of the six individuals are major

landowners in the area and also are members of the local water commission, “so they can irrigate all they want . . . and then they say, ‘O.K., well what’s left over, we’re now going to let everybody else irrigate.’” Tr. at 19. He also said that he felt threatened as soon as he saw that six people had come onto his property to see him. “And as soon as I recognized them, I knew that there was going to be - - I knew they wanted to do something to me.” Tr. at 21. Although they did not initially give him any indication that they wanted to harm him physically, he said, when he told them he did not want to discuss the irrigation matter, “they started getting hostile and calling me names and the profanity started,” and that’s when he felt threatened and got his revolver. *Id.* He added that he “was just doing it in self defense. I told them to leave, and they refused to leave.” *Id.* He did not push it into anyone’s ribs, he said, or point the gun at anyone at any time. Tr. at 56-57. When asked why he did not simply call the police, he responded that the nearest police station was 35 miles from his property and that, when the individual had previously had occasion to call the police, they took two to two-and-one-half hours to respond. Tr. at 22.

The six people filed a criminal complaint. The individual testified that, although the six later wanted to drop all charges, the local district attorney decided to prosecute anyway. Tr. at 25. The district attorney and the individual eventually reached an agreement whereby the individual would plead guilty and would be sentenced to five years of probation, during which the individual was to serve as the area’s “XXXXXXX,” or XXXXXXXX.² Tr. at 26. During the two years that he has served as the XXXXXXXX, the individual said, he has not had any further incidents with any of the six individuals that involved violence or threats of violence. Tr. at 35. Finally, the individual testified that part of the reason that he got his revolver on the day in question was because he has a bad back, and was afraid that a severe beating might leave him crippled for life. Tr. at 29. He produced bottles of several prescription medicines that he said he was taking for this condition.

Three of the individual’s friends also testified. The first, a local land owner, stated that she has previously had trouble regarding irrigation issues with one of the six people involved in the incident in question, and that in a dispute, she would believe the individual’s version of events before she would believe this person’s version. Tr. at 67. All three indicated that, to the best of their knowledge, the individual was a law-abiding person whom they had not known to behave in a violent manner. Tr. at 59-83.

V. ANALYSIS

After reviewing the testimony and the exhibits in this proceeding, I am certain that water rights are an emotional and hotly-contested issue in the individual’s area. I am also convinced that the individual had an ailing back at the time of the incident in question, and I find these to be mitigating factors. However, I also believe that the individual intentionally minimized the seriousness of his conduct during his testimony at the hearing. This lack of candor, and the seriousness of the incident itself, leave me with important and unresolved concerns regarding the individual’s honesty and reliability.

²XXXXXXXXXXXXXXXXXXXXXXXXXXXX.

First, I must highlight some conflicts in the evidence. As previously stated, at the hearing the individual denied having pushed his gun into anyone's ribs or pointing it at anybody during the incident. However, this testimony is contradicted by the statements of three of the other six people involved in the incident, as reflected in the police report. According to that report, one of the six said that the individual "stuck the gun into [another of the six'] ribs and pushed him." Another said that he was afraid that the individual "was going to shoot him when the individual jabbed a revolver into his rib area." A third indicated that he saw the individual "point the gun into [the other person's] ribs, prior to [that other person's] getting into his truck." A fourth person stated that he did not see the individual point his gun at anyone, but also said that when the individual began shooting, he started walking toward his truck in an effort to leave the property. DOE Exhibit 7 at page 7.³ The individual attempted to explain at the hearing that, as an ex-soldier, he would not have allowed anyone to get close enough to him to take his weapon away. Tr. at 57. However, he admitted during the PSI that he got close enough to one of the people involved, after that person had gotten into his truck, to attempt to strike him with one hand while holding the revolver in the other. PSI at 22-24. According to the police report, the individual further admitted that during this attempt, he "might have accidentally pointed the gun at" the person he was attempting to strike. DOE Exhibit 7 at page 8.

There are also discrepancies between the individual's testimony at the hearing and the statements of three of the six visitors concerning the two shots that the individual fired during the incident. The individual stated that he "shot into the ground twice." Tr. at 14. However, according to the police report, one of the six said that the individual "fired one round into the ground," and when the six did not leave, "fired a second round, this one striking the tire rim of [another of the six'] truck." The owner of the truck then told the individual to shoot again, and the individual "pointed the gun at the truck and squeezed the trigger but nothing happened." Another two of the six visitors stated that the individual fired once into the ground and another round into the rim of the truck. DOE Exhibit 7 at page 7. The police officer asked the individual whether one of the shots might have hit the truck, and the individual replied that it could have because of how close they were standing to the vehicle. *Id.* at page 8. However, during the PSI the individual indicated that he did not see how either of his shots could have hit the truck "because [the six people] were right here and the vehicle was off over there. . . ." PSI at 28.

I recognize that it is not uncommon for someone's recollection of an incident to change over time, and that participants in an event will often give, in good faith, differing accounts of that event. However, in this case a key consideration is the fact that the individual pled guilty to three felony counts of Aggravated Assault. Three people gave statements to the police that directly contradicted significant elements of the individual's sworn testimony. Given this number of statements, the individual's own contradictory remarks and his strong interest in minimizing the seriousness of the event, I believe that the individual did point his gun into the ribs of one of the six and did shoot at the truck's tire rim, despite his testimony to the contrary at the hearing. These inconsistencies leave me with substantial doubts concerning the individual's honesty.

³ The remaining two of the six people who entered the individual's property on the day of the incident in question were unavailable and were not interviewed by the police.

I found another aspect of the individual's testimony at the hearing to be troubling. He said that after he went into his house and got his pistol, he "went outside and shot into the ground twice." Tr. at 14. Then, "this one individual came at me, he's about 6'2", 350 pounds, and he threatened me that he was going to beat the shit out of me." *Id.* I simply find it difficult to believe that an unarmed man would approach and threaten an armed person who has already demonstrated a willingness to discharge his weapon.

Moreover, the behavior described above is part of a series of actions on the part of the individual that could easily have led to a killing or to serious bodily injury. As an initial matter, it is clear from the police report and from the individual's own account that it was the individual's argumentative and aggressive behavior from the outset that set the tone for what was to follow. According to the police report, one of the six said that the individual was very upset and did not give anyone a chance to talk or explain why they were there. Another said that the individual "was angry as soon as they arrived." DOE Exhibit 7 at page 7. A third said that as they arrived, the individual "appeared very angry and told the men he knew why they were there and they needed to 'get the hell off my property.'" *Id.* The individual's narrative of the event, reproduced in pertinent part above, also suggests that the angry exchange of words was initiated by the individual. Furthermore, by getting his pistol, the individual introduced the threat of deadly force into an already volatile situation without any direct and immediate threat of violence being made toward himself. The following exchange occurred during the PSI.

Q. But why did you feel that it was necessary to get a weapon?

A. Because they were, there was six of 'em they were –

Q. I know, but were they threatening you in any way?

A.

Well, they were threatening me in different ways, you know –

Q. Like in what ways?

A. Their body movements and their –

Q. Tell me specifically what?

A. Their body movements were –

Q. Uh-huh.

A. – and then the language they were using.

The security analyst then asked the individual about alternative courses of action that he could have taken.

Q. – you could have [called the police and then] stayed in your house.

A. – well maybe I could have, but I felt that they, you know, the thing about it I couldn't leave my stuff outside and they're gonna wreck the place or whatever. I don't know, maybe they weren't gonna do anything, I don't know, but I felt I was threatened at the time.

Q. Okay. Let's go back then and tell me, uh, what they did specifically, what they said specifically that made you feel threatened.

A. Well they said they weren't gonna leave. They said . . . "we're not going to leave till we're good and fucking ready to leave."

Q. Okay.

A. "And we're not leaving," they said. And then I told 'em, I says, "You are leaving." And then they kept saying, "Well, we're not leaving." And even when I went outside they still said they weren't going to leave.

Q. . . did they ever tell you they were going to hurt you? Did they say things to indicate they were going to harm you physically in any way?

A. No.

Q. Okay. It was mostly because they were refusing to leave?

A. Exactly.

Q. Now then, you were telling me about their body motions, tell me about that.

A. Well they were staying right there by the trucks and they were talking to themselves, . . . like trying to conjure something or, what to do or something.

PSI at 16-20. After emerging from his house with the pistol, the individual jabbed it into the ribs of one of the visitors, and admittedly attempted to strike one of them with one hand, while holding the pistol in the other. These acts could have easily resulted in an accidental discharge of the weapon, and serious bodily injury or even death. Consistency of judgment is a key element of reliability. By introducing the threat of deadly force into a situation in which he had not been physically attacked, or threatened with direct and immediate harm, the individual exhibited extremely poor judgment.

At the hearing, the individual attempted to demonstrate the mitigating circumstance that the event described above is an isolated incident that is unlikely to recur. *See* 10 C.F.R. § 710.7(c). In support of this contention, the individual submitted three exhibits. The first is a motion that was filed in litigation in the local federal district court concerning water rights issues. According to the individual, this document sets forth his water rights and the process by which he can obtain water for his property. Tr. at 49. The second is a letter from one of the people involved in the incident on the individual's property. It states that the incident "was a great misunderstanding and unintentional," and that they have reached "an agreement on the matter." Individual's Exhibit B. The third exhibit is an "Order of Conditional Discharge" issued by a local state court. According to the individual, this exhibit documents his claim that, as a part of his plea agreement, he was ordered to serve as XXXXXXXX for a period of five years. Tr. at 26. Also operating in the individual's favor is the fact that he had not previously been arrested for any offense involving the use or threat of violence. Tr. at 37, 46.

Despite this information, I am unable to conclude that the individual has demonstrated the applicability of this mitigating factor. As an initial matter, the individual's exhibits are of limited usefulness in assessing his potential for future unlawful or violent behavior. Contrary to the individual's assertion, the motion that was filed with the local federal district court does not settle the issues surrounding his right to irrigate. In this document, filed on October 10, 2002, the movants allege that the individual diverted the entire flow of a local stream, with intermittent exceptions, and that as a result, other water rights owners were deprived of the use of any water for irrigation. The movants ask that the court enjoin the individual from further diversion of water from the stream for the remainder of 2002 and require the individual to consult with the local water authorities before diverting water in 2003. Individual's Exhibit A. There is no indication in the record as to whether the

court granted or denied the motion. However, even if the motion was granted, the relief requested was only for the years 2002 and 2003. It therefore does not show that future disputes concerning water rights are less likely to occur. The motion does refer to a partial final decree issued by the court in 1973, which the movants claim adjudicated the rights of the individual and others to divert water from the stream. However, since the existence of this decree did not prevent the dispute that led to the incident in question, I have little faith that it will deter future conflicts between the individual and others concerning water rights.

Although the letter from one of the six visitors states that the incident was “unintentional,” I do not believe that this adjective is applicable to the individual’s actions. Moreover, assuming that the “agreement on the matter” mentioned in the letter refers to the matter that gave rise to the altercation, the letter does not reduce the potential for future disagreements involving the individual.

The individual’s final exhibit, the “Order of Conditional Discharge,” states that he pled guilty to three counts of Aggravated Assault with a Deadly Weapon, a felony, and one count of Battery, a misdemeanor.⁴ Pursuant to a plea agreement, the Order continued, the individual was placed on five years’ supervised probation and was ordered to perform community service for the local ditch association during this time. Although the Order does not specifically provide that this community service was to be performed as the XXXXXXXX, the testimony of the individual’s friends during the hearing established that he is currently serving in this capacity. Tr. at 65, 76. However, even if I were to assume that the individual’s service in this position would make a recurrence of his earlier unacceptable conduct less likely, the individual testified that he is to serve as XXXXXXXX for only two more years. Tr. at 27. This exhibit is therefore of no value in predicting the individual’s behavior after that period of time. It does, however, underline the seriousness of the individual’s guilty plea.

Finally, although the individual has no record of other arrests or convictions, there is some indication that he may have previously engaged in assaultive behavior. During the course of events leading up to the individual’s divorce from his first wife in 1997, she obtained a restraining order against him, alleging a pattern of physical and emotional abuse toward her and their children. PSI at 73-81. The individual denied ever having physically or emotionally abused his ex-wife or their children. PSI at 78, 81. However, the individual admitted that during an argument in the living room of their home, he broke an item on their coffee table in anger, and his wife left the room, went into their bedroom, and jumped out of a window. PSI at 88-89. Afterward, he said, he asked her “‘Well why did you do that for, you know, I’m not gonna hurt you, I’m not gonna touch you?’ And she said, ‘Well, I thought you were gonna hurt me.’” *Id.* at 89.

I am very much aware of the fact that false accusations are sometimes made during the course of a divorce proceeding. Nevertheless, I find it difficult to believe that his ex-wife would jump out of a window unless she sincerely believed that the individual was about to strike her. Her extreme reaction in this situation lends credence to her allegations of physical abuse. For these reasons, I find

⁴I note that although the individual pled guilty to Battery, during the hearing he denied his guilt of this offense. Tr. at 15.

that the individual has not established the mitigating circumstance that the incident on his property was an isolated event that is unlikely to recur.

IV. CONCLUSION

For the reasons set forth above, I conclude that the individual has engaged in unusual conduct or is subject to circumstances which tend to show that he is not honest, reliable, or trustworthy within the meaning of section 710.8, paragraph (1) of those regulations. I further conclude that the individual has failed to demonstrate that restoring his clearance would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, the individual's access authorization should not be restored at this time.

Robert B. Palmer
Hearing Officer

Office of Hearings and Appeals

Date: October 4, 2004